

Order

July 13, 2005

Michigan Supreme Court
Lansing, Michigan

Clifford W. Taylor
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Justices

ADM File No. 2003-04

Amendment of Rules 6.302,
6.425, 6.445, and 6.625 of the
Michigan Court Rules

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments are adopted, effective immediately.

[The present language is amended as indicated below by underlining
for new text and strikeover for text that is deleted.]

Rule 6.302 Pleas of Guilty and Nolo Contendere

- (A) Plea Requirements. The court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate. Before accepting a plea of guilty or nolo contendere, the court must place the defendant or defendants under oath and personally carry out subrules (B)-(E).
- (B) An Understanding Plea. Speaking directly to the defendant or defendants, the court must advise the defendant or defendants of the following and determine that ~~the~~ each defendant understands:
- (1) the name of the offense to which the defendant is pleading; the court is not obliged to explain the elements of the offense, or possible defenses;
 - (2) the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law;
 - (3) if the plea is accepted, the defendant will not have a trial of any kind, and so gives up the rights the defendant would have at a trial, including the right:
 - (a) to be tried by a jury;
 - (b) ~~to be tried by the court without a jury, if the defendant chooses
and the prosecutor and court consent~~

- ~~(e)(b)~~ to be presumed innocent until proved guilty;
- ~~(d)(c)~~ to have the prosecutor prove beyond a reasonable doubt that the defendant is guilty;
- ~~(e)(d)~~ to have the witnesses against the defendant appear at the trial;
- ~~(f)(e)~~ to question the witnesses against the defendant;
- ~~(g)(f)~~ to have the court order any witnesses the defendant has for the defense to appear at the trial;
- ~~(h)(g)~~ to remain silent during the trial;
- ~~(i)(h)~~ to not have that silence used against the defendant;
and
- ~~(j)(i)~~ to testify at the trial if the defendant wants to testify.

The requirements of this section may be satisfied by a writing on a form approved by the State Court Administrator. If a court uses a writing, the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights.

- (4) if the plea is accepted, the defendant will be giving up any claim that the plea was the result of promises or threats that were not disclosed to the court at the plea proceeding, or that it was not the defendant's own choice to enter the plea;
- (5) any appeal from the conviction and sentence pursuant to the plea will be by application for leave to appeal and not by right; ~~and~~
- (6) ~~if the plea is accepted, the defendant is not entitled to have counsel appointed at public expense to assist in filing an application for leave to appeal or to assist with other postconviction remedies unless the defendant is financially unable to retain counsel and~~
 - ~~(a) the defendant's sentence exceeds the guidelines,~~
 - ~~(b) the plea is a conditional plea under MCR 6.301(C)(2),~~
 - ~~(c) the prosecuting attorney seeks leave to appeal, or~~

- (d) ~~the Court of Appeals or the Supreme Court grants leave to appeal.~~

(C)-(F)[Unchanged.]

Rule 6.425 Sentencing; Appointment of Appellate Counsel

(A) [Unchanged.]

(B) Presentence Report; Disclosure Before Sentencing. The court must provide copies of the presentence report to permit the prosecutor, and the defendant's lawyer, or the defendant if not represented by a lawyer, and the defendant to review the presentence report at a reasonable time before the day of sentencing. The court may exempt from disclosure information or diagnostic opinion that might seriously disrupt a program of rehabilitation and sources of information that have been obtained on a promise of confidentiality. When part of the report is not disclosed, the court must inform the parties that information has not been disclosed and state on the record the reasons for nondisclosure. To the extent it can do so without defeating the purpose of nondisclosure, the court also must provide the parties with a written or oral summary of the nondisclosed information and give them an opportunity to comment on it. The court must have the information exempted from disclosure specifically noted in the report. The court's decision to exempt part of the report from disclosure is subject to appellate review.

(C) [Unchanged.]

(D) ~~Imposition of Sentence.~~

- (1) Sentencing Guidelines. The court must use the sentencing guidelines, as provided by law. Proposed scoring of the guidelines shall accompany the presentence report. Not later than the date of sentencing, the court must complete a sentencing information report on a form to be prescribed by and returned to the state court administrator.

(E) (2) Sentencing Procedure.

- (1) The court must sentence the defendant within a reasonably prompt time after the plea or verdict unless the court delays sentencing as provided by law. At sentencing, the court, ~~complying on the record,~~ must, on the record:

- (a) determine that the defendant, the defendant's lawyer, and the prosecutor have had an opportunity to read and discuss the presentence report,

- (b) give each party an opportunity to explain, or challenge the accuracy or relevancy of, any information in the presentence report, and resolve any challenges in accordance with the procedure set forth in subrule ~~(D)~~(3)(E)(2),
- (c) give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence,
- (d) state the sentence being imposed, including the minimum and maximum sentence if applicable, together with any credit for time served to which the defendant is entitled,
- (e) if the sentence imposed is not within the guidelines range, articulate its the substantial and compelling reasons for justifying that specific departure imposing the sentence given, and
- (f) if a victim of the crime has suffered harm and the court does not order restitution as provided by law or orders only partial restitution, state the reasons for its action order that the defendant make full restitution as required by law to any victim of the defendant's course of conduct that gives rise to the conviction, or to that victim's estate.

~~(3)~~(2) Resolution of Challenges. If any information in the presentence report is challenged, the court must allow the parties to be heard regarding the challenge, and make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing. If the court finds merit in the challenge or determines that it will not take the challenged information into account in sentencing, it must direct the probation officer to

- (a) correct or delete the challenged information in the report, whichever is appropriate, and
- (b) provide defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections.

~~(E)~~(F) Advice Concerning the Right to Appeal; Appointment of Counsel.

- (1) In a case involving a conviction following a trial, immediately after imposing sentence, the court must advise the defendant, on the record, that
 - (a) the defendant is entitled to appellate review of the conviction and sentence,

- (b) if the defendant is financially unable to retain a lawyer, the court will appoint a lawyer to represent the defendant on appeal, and
 - (c) the request for a lawyer must be made within 42 days after sentencing.
- (2) In a case involving a conviction following a plea of guilty or nolo contendere, immediately after imposing sentence, the court must advise the defendant, on the record, that
- (a) the defendant is entitled to file an application for leave to appeal;
 - (b) if the defendant is financially unable to retain a lawyer, the court ~~must appoint~~ defendant may request appointment of a lawyer to represent the defendant on appeal ~~if, and~~
 - (i) ~~the defendant's sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines;~~
 - (ii) ~~the defendant seeks leave to appeal a conditional plea under MCR 6.301(C)(2);~~
 - (iii) ~~the prosecuting attorney seeks leave to appeal; or~~
 - (iv) ~~the Court of Appeals or the Supreme Court grants the defendant's application for leave to appeal.~~
 - (c) ~~If the defendant is financially unable to retain a lawyer, the court, in its discretion, may appoint a lawyer to represent the defendant on appeal if all the following apply:~~
 - (i) ~~the defendant seeks leave to appeal on the basis of an alleged improper scoring of an offense variable or a prior record variable;~~
 - (ii) ~~the defendant objected to the scoring or otherwise preserved the matter for appeal; and~~
 - (iii) ~~the sentence constitutes an upward departure from the upper limit of the minimum sentence range that the defendant alleges should have been scored; and~~
 - (d)(c) the request for a lawyer must be made within 42 days after sentencing, ~~unless the entitlement to counsel arises under (b)(iii) or (iv).~~

~~With regard to paragraphs (b) and (c), the court is required to give only the advice that is applicable to the particular circumstances.~~

~~Upon sentencing, the court shall give the defendant a form developed by the State Court Administrative Office that the defendant may complete and file as an application for leave to appeal.~~

- (3) The court also must give the defendant a request for counsel form containing an instruction informing the defendant that the form must be completed and returned to the court within 42 days after sentencing if the defendant wants the court to appoint a lawyer. ~~The 42-day time limit does not apply if the entitlement to counsel arises under subrule (2)(b)(iii) or (iv).~~
- (4) When imposing sentence in a case in which sentencing guidelines enacted in 1998 PA 317, MCL 777.1 *et seq.*, are applicable, if the court imposes a minimum sentence that is longer or more severe than the range provided by the sentencing guidelines, the court must advise the defendant on the record and in writing that the defendant may seek appellate review of the sentence, by right if the conviction followed trial or by application if the conviction entered by plea, on the ground that it is longer or more severe than the range provided by the sentencing guidelines.

~~(F)~~(G) Appointment of Lawyer; Trial Court Responsibilities in Connection with Appeal.

- (1) Appointment of Lawyer.
 - (a) Unless there is a postjudgment motion pending, the court must rule on a defendant's request for a lawyer within 14 days after receiving it. If there is a postjudgment motion pending, the court must rule on the request after the court's disposition of the pending motion and within 14 days after that disposition.
 - (b) In a case involving a conviction following a trial, if the defendant is indigent, the court must enter an order appointing a lawyer if the request is filed within 42 days after sentencing or within the time for filing an appeal of right. The court should liberally grant an untimely request as long as the defendant may file an application for leave to appeal.
 - (c) In a case involving a conviction following a plea of guilty or nolo contendere, the court should liberally grant the request if it is filed within 42 days after sentencing.

~~(e)~~(d) Scope of Appellate Lawyer's Responsibilities. The responsibilities of the appellate lawyer appointed to represent the defendant include representing the defendant

- (i) in available postconviction proceedings in the trial court the lawyer deems appropriate,
- (ii) in postconviction proceedings in the Court of Appeals,
- (iii) in available proceedings in the trial court the lawyer deems appropriate under MCR 7.208(B) or 7.211(C)(1), and
- (iv) as appellee in relation to any postconviction appeal taken by the prosecutor.

(2) Order to Prepare Transcript. The appointment order also must

- (a) direct the court reporter to prepare and file, within the time limits specified in MCR 7.210,
 - (i) the trial or plea proceeding transcript,
 - (ii) the sentencing transcript, and
 - (iii) such transcripts of other proceedings, not previously transcribed, that the court directs or the parties request, and
- (b) provide for the payment of the reporter's fees.

The court must promptly serve a copy of the order on the prosecutor, the defendant, the appointed lawyer, the court reporter, and the Michigan Appellate Assigned Counsel System. If the appointed lawyer timely requests additional transcripts, the trial court shall order such transcripts within 14 days after receiving the request.

(3) Order as Claim of Appeal; Trial Cases. In a case involving a conviction following a trial, if the defendant's request for a lawyer, timely or not, was made within the time for filing a claim of appeal, the order described in ~~(F)~~ subrules (G)(1) and (2) must be entered on a form approved by the State Court Administrator's Administrative Office, entitled "Claim of Appeal and Appointment of Counsel," and the court must immediately send to the Court of Appeals a copy of the order and a copy of the judgment being appealed. The court also must file in the Court of Appeals proof of having made service of the order as required in subrule ~~(F)~~(G)(2). Entry of the order by the trial court pursuant to this subrule constitutes a timely filed claim of appeal for the purposes of MCR 7.204.

Rule 6.445 Probation Revocation

(A)-(E)[Unchanged.]

(F) Pleas of Guilty. ~~With the consent of the court that granted probation, the~~ The probationer may, at the arraignment or afterward, plead guilty to the violation. Before accepting a guilty plea, the court, speaking directly to the probationer and receiving the probationer's response, must

- (1) advise the probationer that by pleading guilty the probationer is giving up the right to a contested hearing and, if the probationer is proceeding without legal representation, the right to a lawyer's assistance as set forth in subrule (B)(2)(b),
- (2) advise the probationer of the maximum possible jail or prison sentence for the offense,
- (3) ascertain that the plea is understandingly, voluntarily, and knowingly made, and
- (4) establish factual support for a finding that the probationer is guilty of the alleged violation.

(G) Sentencing. If the court finds that the probationer has violated a condition of probation, or if the probationer pleads guilty to a violation, the court may continue probation, modify the conditions of probation, extend the probation period, or revoke probation and impose a sentence of incarceration. The court may not sentence the probationer to prison without having considered a current presentence report and having complied with the provisions set forth in MCR 6.425(B), ~~(D)(2)~~ and ~~(D)(3)~~ (E).

(H) [Unchanged.]

Rule 6.625 ~~Appeal; Appointment of Lawyer~~

An appeal from a misdemeanor case is governed by subchapter 7.100. ~~An indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere is entitled to the assistance of assigned appellate counsel at public expense if the prosecution seeks leave to appeal or the Court of Appeals or the Supreme Court grants the defendant's application for leave to appeal.~~

Staff Comment: On March 12, 2002, the Court appointed the Committee on the Rules of Criminal Procedure to review the rules to determine whether any of the provisions should be revised. The committee issued its report on June 16, 2003,

recommending numerous amendments of MCR 6.302 and 6.725. The committee did not recommend any amendments of MCR 6.625. A public hearing on the committee's recommendations was held May 27, 2004.

The Court adopted most of the committee's recommendations regarding Rule 6.302, and modified the rule to conform to the ruling of the United States Supreme Court in *Halbert v Michigan*, 545 US ____; 2005 WL 1469183 (June 23, 2005).

The Court adopted many of the committee's recommendations concerning MCR 6.425, however the Court eliminated the requirement that "[n]ot later than the date of sentencing, the court must complete a sentencing information report on a form to be prescribed by and returned to the state court administrator" in MCR 6.425(D). The Court also modified the language of the rule to incorporate the Court's holding in *People v Babcock*, 469 Mich 247 (2003) and to conform to the ruling in *Halbert*.

The Court did not follow the committee's recommendation that MCR 6.625 not be amended, but instead modified the rule to conform to the ruling in *Halbert*.

The staff comment is not an authoritative construction by the Court.



I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 13, 2005, Angela J. Meyer
Deputy Clerk